As between the parties to this litigation the bankruptcy did not vest the post bankruptcy property in the Official Assignee, and although he may be able to assert a claim over after acquired property the rights of the parties *vis-à-vis* one another are not affected.

Ex parte Rabbidge; In re Pooley 8 Ch. D. 367 and *In re Wigzell* (1921) 2 K.B. 835 cited by Mr. Rintoul do not affect this case. Those cases related to property which at all material times had vested in the trustee, property which was not after acquired property.

The plaintiff is entitled to proceed with his action against the respondent. Whether, if he obtains judgment, he can enforce that judgment without regard to the rights of the Official Assignee is an entirely different matter which does not now fall to be considered. Suffice it to say that the property of the bankrupt divisible amongst his creditors shall comprise all such property as may be acquired by the bankrupt before his discharge—Section 42.

We are not now concerned with how after acquired property is to be distributed, but it continues in the bankrupt until the Official Assignee interferes to claim it. *Dyster v. Randall* (1926) Ch. 932.

The appeal is allowed. The order dismissing the respondent from the suit is set aside.

The appellant will have the costs of the appeal.

Poyser, C.J. (F.M.S.)—I agree.

Gordon Smith, Ag. J.A.—I agree.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J. (S.S.), AITKEN AND MURRAY-AYNSLEY, JJ.

May 19, 1938.

MURUGAPPA CHETTIAR

v.

LETCHUMANAN CHETTIAR.

[SELANGOR CIVIL APPEAL No. 7 of 1937]

Land Code (Cap. 138) S. 149—application for an order for sale—whether a "suit" within section 5 of the Civil Procedure Code—order made without investigation of certain issues—order set aside.

A Summons under section 149 of the Land Code is not a "suit" within the meaning of section 5 of the Civil Procedure Code.

Chettiappa Chetty vs. Raja Abdul Rashid, (1931–32) F.M.S.L.R. 345 applied.

The respondent was the chargee of certain land in the District of Ulu Langat. The chargors were one Meyappa Chettiar and the Appellant. The charge was for $20,000/–, but it had been reduced to $15,500/– by the payment of $4,500/– alleged to have been made by the appellant or his predecessors in interest. The chargors were the proprietors of the land in equal shares, but they were jointly and severally liable for the whole of the money due on the charge. The chargee commenced proceedings under section 149 of the Land Code for the purpose of enforcing his charge by an order for sale. On the hearing of the Originating Summons, the appellant alleged that each of the original chargors, then represented by Meyappa and the appellant, received $10,000/– and that having paid $4,500/– there was due from him a balance of $5,500/–. This sum he paid into Court. The appellant also alleged that Meyappa was the nominee of the chargor. The learned Judge before whom the Originating Summons was heard made an order for sale. The appellant appealed.

Held, that, the Court below not having investigated the allegations of the appellant before making the order for sale, the order should be set aside and the matter remitted to the Court of first instance for the trial of following issues:—

(a) Was Meyappa a nominee of or trustee for the Respondent?

(b) What portion of the mortgage money had been repaid by or on behalf of the owner of the appellant's undivided half share in the property?

CIVIL APPEAL.

Briggs (*Cumarasami* with him) for appellant.

Ramani (*Tan Teow Bok* with him) for Respondent.

Cur. Adv. Vult.

McElwaine, C.J. (S.S.)—Two main points are raised on this appeal: first, that owing to an Originating Summons of 1932 between the predecessors in interest of the parties to this dispute being undisposed of, an order for sale under section 149 of the Land Code cannot be made.

In my opinion a summons for an order for sale is not a suit within the meaning of section 5 of the Civil Procedure Code.

The Legislature has provided that a chargee shall have certain rights in case of default of payment. These included distraining for rent and selling the land charged both proceedings requiring the intervention of the Court, but in neither case does the proceeding appear to be a suit.

The Court Order does not confer a right to the money due, it merely ensures that a right shall not be enforced without the leave of the Court. The question has already been settled in *Chettiappa Chetty v. Raja Abdul Rashid,* (1931–2) F.M.S.L.R., 345.

The second point was that while the appellant and one Meyappa are the registered proprietors of this land, Meyappa is a mere nominee of the respondent.

This point becomes of importance because the appellant claims that of the $20,000/– due on the original charge he has paid off $4,500/–, leaving the

sum of $15,500/- still due and the appellant's case is that while the land is security for this sum nevertheless the money was due by the two owners of the land in equal shares and that the appellant, having paid $4,500/-, now owes only $5,500/- (which sum he has been ready and willing to pay and which has been paid into Court), the remaining $10,000/- being due by Meyappa, the other registered owner who is a mere nominee of the respondent.

If this is so, the respondent is not only a chargee by assignment but is in reality also one of the chargors.

It appears from an affidavit of the respondent that on 13th July 1935 he purchased an undivided half share of the charged land and that on the 23rd September 1935 he transferred this undivided half share to Meyappa subject to the charge.

He does not say what, if any, consideration Meyappa gave for this transfer.

On the same day—23rd September, the original chargee assigned the charge to the respondent.

Keruppa Chettiar, attorney for the appellant, in an affidavit stated that the transfer by the respondent to Meyappa of the undivided half share was a sham transaction made with the intention of avoiding payment of the full sum of $10,000/- for which the respondent and his half share would be liable under the charge.

This allegation is not denied.

If the statements to which I have referred are true, then the respondent is not only a chargee but is in the position of a joint chargor and between him and the appellant—the other joint chargor—an account should be taken to ascertain how much of the $4,500/- which has been paid on account of the charge has been paid by or on behalf of the appellant or his predecessor in interest.

The case should be remitted to the Court below to try the following issues:

1. Is Meyappa a nominee of or trustee for the Respondent?
2. What portion of the mortgage money has been repaid by or on behalf of the owner of the appellant's undivided half share in the property?

The Order for sale and for payment of costs is set aside. On determination of the two issues the respondent may, if he is so advised, renew his application for an order for sale.

The appellant shall have his costs of the appeal. The costs in the Court below (including the costs in the proceedings from which this appeal is brought) will be in the discretion of the judge to whom the case is remitted.

Aitken, J.—The facts out of which this matter arises are set out clearly and concisely by the learned Judge in the Court below. It is therefore unnecessary for me to attempt any re-statement of them, and since none of the allegations contained in the Appellant's affidavit of the 14th of October, 1937, have ever been contradicted or questioned in any way in these proceedings, I am of opinion that they must all be assumed to be correct for the purposes of this appeal.

On that assumption, then, the position at the date of this Originating Summons (the 22nd of September 1937) was as follows:—The Respondent-Chargee was the registered owner of a charge over the land in question in respect of which the sum of $15,500/- was admittedly due to him as such chargee. The Appellant-Chargor was the registered proprietor of an undivided half share in the land, and the other Chargor, A.R.M.M. Meyappa Chettiar, was also the registered proprietor of an undivided half share in the land, but held the same in trust for the Respondent-Chargee. This curious and unusual state of affairs was further complicated by the fact that the Appellant Chargor's predecessors in title had paid off $4,500/- of the principal sum of $20,000 for which the charge was originally given, whereas A.R.M.M. Meyappa Chettiar's predecessors in title had made no such payment. As that $20,000/- was equally divided between the original chargors, and applied by them for their own respective purposes, it would seem clear enough that their successors in title, the present chargors, must, as between themselves, contribute to the repayment of that principal sum in the same proportions as those in which the original chargors divided the $20,000/- amongst themselves, that is, in the amount of $10,000/- each.

The Appellant-Chargor is ready to pay the balance of the $10,000/- due from him on the contributory basis which I have just described, and has deposited the balance of $5,500 in Court. He contends that the Respondent-Chargee, in his other capacity as *cestui que trust* of an undivided half share in the land, is bound in equity to pay to himself, in his chargee capacity, the $10,000/- which remains due on the charge, and so prevent the land from being sold. If the facts are as the Appellant-Chargor alleges them to be, and I have already explained that we must assume them to be so for the purposes of this appeal, then I hold

that the Chargee-Respondent cannot shelter himself behind his nominee A.R.M.M. Meyappa Chettiar, and evade the plain duty which rests on him, as the beneficial owner of the other undivided half share in the lands, of contributing $10,000/- towards payment in full of the principal sum secured by the charge.

I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a Chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may "shew cause" either in law or equity against an application for an order for sale, and that the Courts should refuse to make an order in every case where it would be unjust to do so. By "unjust" I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

For these reasons I think that the order for sale should be set aside and this matter remitted to the Court below, which will investigate the Appellant-Chargor's allegations in any way most convenient to itself and the parties, and do justice between them in accordance with its findings of fact on those allegations.

During the hearing of this appeal we heard a good deal of argument on the point as to whether an application by Originating Summons under Section 149 of the Land Code is a "Suit" within the meaning of that term as used in Section 5 of the Civil Procedure Code. In my opinion the point is covered by the decision of this Court in *V.R.K.R.S. Chettiappah Chettiar v. Raja Abdul Rashid Ibni Almerhum Sultan Idris,* F.M.S.L.R. Vol. 8 p. 345, which is an authority binding on us. I therefore hold that such an application is not a "Suit" to which Section 5 of the Civil Procedure Code applies.

Lastly, I agree with the order as to costs proposed by the learned President.

Murray-Aynsley, J.—I concur.

Appeal allowed. Matter remitted to Court below for trial of issues.

[ORIGINAL CIVIL JURISDICTION]

MURRAY-AYNSLEY, J.

July 8, 1938.

SITHAMBARAM CHETTYAR v. CHONG FATT.

[PERAK CIVIL SUIT No. 176 of 1936]*

Estoppel—application for sale of charged land—service of Originating Summons on Chargor—order made in default of appearance—sale—subsequent suit for balance due on charge—whether Chargor estopped from pleading infancy.

In 1928 the defendant charged a piece of land in favour of plaintiff. In 1933 the plaintiff applied by way of Originating Summons for the sale of the charged property. The defendant was served but he made default. The land was sold as a result of the proceedings. In a Suit by the plaintiff for the balance due under the charge, the defendant pleaded that he did not execute the charge or alternatively, that at the date of its execution he was an infant. It was alleged that the defendant was born in 1914. In his reply the plaintiff objected that the defendant was estopped from raising these defences by reason of the judgment in the proceedings instituted in 1933.

Held, that inasmuch as the defendant was an infant at the time of institution of the proceedings in 1933 and there was no guardian ad litem to represent him, nothing done or omitted by him in course of these proceedings could act as an estoppel.

Murray-Aynsley, J.—This case has come before me on a preliminary issue on a point of law namely whether Defendant is estopped from raising his defence by reason of a prior judgment between the parties.

The facts are peculiar. The Plaintiff is a Chettyar. On January 28th 1928 a piece of land was on the register in the name of the Defendant and a charge was executed in favour of the Plaintiff apparently by the Defendant. In 1933 the Plaintiff took proceedings by way of Originating Summons for the sale of the charged property. The Defendant was served but made default. As the result of the proceedings the land was sold; the Plaintiff sues for the balance due under the charge.

The defence now raised is substantially that the Defendant did not execute the alleged charge or in any event at the date of its execution he was a minor, it being alleged that the Defendant was born in the year 1914.

The Plaintiff replies that the Defendant is estopped from raising these defences owing to the judgment in the Originating Summons proceedings in the year 1933.

A statement of the law as to *Res Judicata* is found in Section 6 of the Civil Procedure Code. That Section is not applicable in this case as the scope of that section is limited to cases where the prior proceedings are a "suit" within the meaning of the

*An appeal was lodged, but it was later withdrawn. [Ed. M.L.J.]